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WORKMEN'S COMPENSATION AND THE CONFLICT  
OF LAWS—THE RESTATEMENT AND OTHER RE-  
CENT DEVELOPMENTS

By RALPH H. DWAN\*

SEVERAL years ago the writer published in this REVIEW an article<sup>1</sup> in which an attempt was made to organize and classify the English and American cases dealing with conflict of laws questions arising out of<sup>2</sup> the application of Workmen's Compensation Acts.<sup>3</sup> Enough water has passed under the bridge since then to warrant a supplementary article on American developments. Notable events have been the very recent publication of the Restatement of the Law of Conflict of Laws<sup>4</sup> and Professor Beale's treatise based on the Restatement,<sup>5</sup> the entry of the United States Supreme Court into the field,<sup>6</sup> and the tendency of legislatures to cover specific problems by amendments to the Acts.<sup>7</sup> In the discussion the organization of the Restatement will be used, followed by a treatment of a few matters not covered by the Restatement.

In the Restatement the topic of Workmen's Compensation begins with an introductory note. The first paragraph states the general characteristics of the Acts. The second paragraph states three theories on which the Acts have been fitted into the fabric of

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<sup>1</sup>Dwan, *Workmen's Compensation and the Conflict of Laws*, (1927) 11 MINNESOTA LAW REVIEW 329; reprinted in (1927) 61 Am. L. Rev. 571; also reprinted with some alterations in (1928) 26 Monthly Labor Review 528 (U.S. Department of Labor; Bureau of Labor Statistics). Frequent references will be made to this article for the earlier authorities. Only the volume and page of the MINNESOTA LAW REVIEW will be cited.

<sup>2</sup>One is tempted to add: "and in the course of."

<sup>3</sup>Hereafter, except in quotations, the term Act will be used to mean Workmen's Compensation Act unless otherwise qualified.

<sup>4</sup>American Law Institute, 1934.

<sup>5</sup>Beale, *A Treatise on the Conflict of Laws* (1935). The discussion of Workmen's Compensation is in Volume 2, sections 398.1-403.1 inc., pp. 1317-1328.

<sup>6</sup>See *infra*, pp. 34-41.

<sup>7</sup>This is indicated in cases cited hereafter. The statutes themselves will not be cited. No attempt has been made to follow up any statutory changes which may have been made since the last reported decision in a particular jurisdiction. Recent reviews of statutory materials may be found in: Bulletin No. 496, United States Bureau of Labor Statistics, *Workmen's Compensation Legislation of the United States and Canada as of January 1, 1929* and later supplementary bulletins; Roos, *The Problem of Workmen's Compensation in Air Transportation*, (1935) 6 *Journal of Air Law* 1, 13-38, 48-69; 1 Schneider, *Workmen's Compensation*, 2nd ed., p. 428-433.

the law. Those theories will be discussed later in connection with the problem of when the local Act applies. The third paragraph considers matters which will be discussed under the following heading.

# I. ENFORCEMENT IN ONE JURISDICTION OF RIGHTS OR AWARDS UNDER ACT OF ANOTHER JURISDICTION.

The introductory note says that an Act *usually* calls for the award of compensation by a particular administrative tribunal and that the difficulties of procedure *may* make it impracticable for a *court* in another state to attempt to administer the Act; hence no award is *ordinarily* made under the provisions of the Act of a foreign state.<sup>8</sup> The words italicized above indicate that there may be exceptions to these statements. It is at least conceivable that a claim for compensation which can be asserted only before an administrative tribunal might be enforced by a similar administrative tribunal in another jurisdiction.<sup>9</sup> At any rate, there is considerable authority for direct enforcement in another jurisdiction of a compensation claim where the applicable Act provides for the fixing of compensation by *court* action, at least where the provisions of the Act can be carried out without too much difficulty.<sup>10</sup>

<sup>8</sup>For authorities, see 11 MINNESOTA LAW REVIEW 329, 331-332; see also *Resigno v. F. Jarka Co.*, (1927) 221 App. Div. 214, 220, 223 N. Y. S. 5; *Bolin v. Swift & Co.*, (Mo. 1934) 73 S. W. (2d) 774.

<sup>9</sup>See 11 MINNESOTA LAW REVIEW 329, 331-332. See dicta in *Scott v. White Eagle Oil and Refining Co.*, (D.C. Kan. 1930) 47 F. (2d) 615. See express provision in the Arizona Act requiring, under certain circumstances, enforcement in Arizona of rights acquired under the Act of another state, if the rights "are such that they can reasonably be determined and dealt with by the commission and the courts of this state." The applicability of this provision is discussed in *Ocean Acc. & Guar. Corp. v. Industrial Com.*, (1927) 32 Ariz. 275, 283-286, 257 Pac. 644. See similar express provision in Idaho Code Annotated 1932, Sec. 43-1415, cited in *Dameron v. Yellowstone Trail Garage*, (1934) 54 Idaho 646, 34 P. (2d) 417.

<sup>10</sup>*Texas Pipe Line Co. v. Ware*, (C.C.A. 8th Cir. 1926) 15 F. (2d) 171, cert. denied (1927) 273 U. S. 742, 47 Sup. Ct. 335, 71 L. Ed. 869; *Lindberg v. Southern Casualty Co.*, (D.C. Tex. 1926) 15 F. (2d) 54, affirmed *United Dredging Co. v. Lindberg*, (C.C.A. 5th Cir. 1927) 18 F. (2d) 453. See 11 MINNESOTA LAW REVIEW 329, 331.

It is an a fortiori case where the Act provides for an ordinary suit at law as a supplemental remedy. *Esteves v. Lykes Bros. S. S. Co.*, (C.C.A. 5th Cir. 1934) 74 F. (2d) 364 (enforcement in Texas federal court of right under Act of Puerto Rico).

The Lindberg case is criticized on the ground that "it is in the nature of a compensation act that there shall be no claim for an unfixed amount but only for the amount fixed by the tribunal in which the case is to be taken up." 2 Beale, *The Conflict of Laws*, sec. 398.1, p. 1317.

In *Ford, Bacon & Davis v. Volentine*, (C.C.A. 5th Cir. 1933) 64 F. (2d) 800, recovery under the Louisiana Act in the federal district court for Mississippi was denied on the ground that the time limitation fixed by the Louisiana Act had expired. The court did not consider it necessary to

The introductory note also states that if an award has been made in a state under its local Act, a suit may be brought in another state on the award. The closest case found is a New York decision<sup>11</sup> requiring the acceptance by the New York liquidator of an insurance company of a claim based upon a compensation award of the Texas Industrial Accident Board. The validity of the original claim could not be reopened; full faith and credit, said the court, must be given to the determination of the Texas tribunal, under the federal constitution. In an analogous case<sup>12</sup> the United States Supreme Court held that a final judgment of an Iowa court of record holding that the deceased workman was engaged in *intra*-state commerce (and affirming an award under the Iowa Act) was *res adjudicata* on that issue and entitled to full faith and credit in an action in Minnesota under the Federal Employers Liability Law. In a companion case<sup>12a</sup> the Supreme Court denied the same effect to a similar decision by the Iowa deputy industrial commissioner on the ground that his decision had not ripened into an enforceable award in Iowa, the effect of which the Court considered itself not called upon to determine. However, lower federal cases<sup>13</sup> contain dicta that such a decision of an administrative workmen's compensation board comes within the *res judicata* principle.

## II. WHEN DOES THE LOCAL ACT APPLY?

This problem is dealt with by three sections of the Restatement.

"Sec. 398. Compensation Under Act of State of Employment.

A workman who enters into a contract of employment in a

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decide whether the Louisiana Act applied under the circumstances. This case was followed, on the statute of limitations point, in *Louisville & N. R. Co. v. Dixon*, (1933) 168 Miss. 14, 150 So. 811; *Dunn Const. Co. v. Bourne*, (1935) 172 Miss. 620, 159 So. 841; both cases involving enforcement in Mississippi of rights under the Louisiana Act, the possibility of which was recognized in *Floyd v. Vicksburg Cooperage Co.*, (1930) 156 Miss. 567, 126 So. 395; see also *Orleans Dredging Co. v. Frazie*, (Miss. 1935) 161 So. 699, 702.

<sup>11</sup>*In re Phillips*, (1923) 206 App. Div. 314, 200 N. Y. S. 639.

<sup>12</sup>*Chicago R. I. & P. Ry. v. Schendel*, (1926) 270 U. S. 611, 46 Sup. Ct. 420, 70 L. Ed. 757. This case and the case cited in the following footnote are discussed more fully in 11 MINNESOTA LAW REVIEW 329, 330.

<sup>12a</sup>*Chicago R. I. & P. Ry. v. Elder*, (1926) 270 U. S. 611, 622, 46 Sup. Ct. 420, 70 L. Ed. 757.

<sup>13</sup>*Dennison v. Payne*, (C.C.A., 2nd Cir. 1923) 293 Fed. 333, 341; *Hoffman v. New York, N. H. & H. R. Co.*, (C.C.A., 2nd Cir. 1934) 74 F. (2d) 227, 230. In the latter case, Augustus N. Hand, Circuit Judge, said: "A decision of an administrative board that a workman (at the time of an accident) was engaged in intrastate commerce is entitled to full faith and credit and can be no more attacked collaterally than that of a court."

state in which a Workmen's Compensation Act is in force can recover compensation under the Act in that state for bodily harm arising out of and in the course of employment, although the harm was suffered in another state, unless the Act provides in specific words or is so interpreted as to apply only to bodily harm occurring within the state.

"Sec. 399. Compensation Under Act of State of Harm.

Except as stated in sec. 401, a workman may recover in a state in which he sustains harm under the Workmen's Compensation Act of that state although the contract of employment was made in another state, unless the Act provides in specific words or is so interpreted as to apply only when the contract of employment is made within the state.

"Sec. 400. Neither Employment Nor Injury in State.

No recovery can be had under the Workmen's Compensation Act of a state if neither the harm occurred nor the contract of employment was made in the state."

Sections 398 and 399 quite properly put the emphasis upon the specific words of the Act, or its interpretation. When the Act is explicit, there is no problem,<sup>14</sup> except the constitutional problem to be discussed later.<sup>15</sup> An increasing number of states cover certain situations expressly in their Acts. Some examples will be mentioned.<sup>16</sup> Where the local Act is not explicit, various

<sup>14</sup>See discussion in 11 MINNESOTA LAW REVIEW 329, 334-335.

<sup>15</sup>Infra, pp. 34-41.

<sup>16</sup>In addition, see cases cited in 11 MINNESOTA LAW REVIEW 329, 334, n. 22; see also:

ARIZONA—Ocean Acc. & Guar. Corp., (1927) 32 Ariz. 275, 257 Pac. 644.

GEORGIA—Metropolitan Casualty Ins. Co. v. Huhn, (1928) 165 Ga. 667, 142 S. E. 121.

IDAHO—Dameron v. Yellowstone Trail Garage, (1934) 54 Idaho 646, 34 P. (2d) 417.

INDIANA—Carl Hagenback, etc. Shows Co. v. Leppert, (1917) 66 Ind. App. 261, 117 N. E. 531.

KANSAS—Evans v. Tibbetts, (1931) 134 Kan. 131, 4 P. (2d) 399 (cf. Davis v. Jacob Dold Packing Co., (1934) 140 Kan. 644, 38 P. (2d) 107).

MAINE—Saunders's Case, (1927) 126 Me. 144, 136 Atl. 722. For discussion of an earlier Maine case, see 11 MINNESOTA LAW REVIEW 329, 342, n. 52.

MARYLAND—Liggett & Myers Tobacco Co. v. Goslin, (1932) 163 Md. 74, 160 Atl. 804, cited infra n. 54.

MICHIGAN—Klettke v. C. & J. Commercial Driveaway, (1930) 250 Mich. 454, 231 N. W. 132; Roberts v. I. X. L. Glass Corporation, (1932) 259 Mich. 644, 244 N. W. 188; Wearner v. West Michigan Conference of Seventh Day Adventists, (1932) 260 Mich. 540, 245 N. W. 802 (cf. Leninger v. Jacobs, (Mich. 1934) 257 N. W. 764).

MISSOURI—State ex rel. Brewen-Clark Syrup Co. v. Compensation Commission, (1928) 320 Mo. 893, 8 S. W. (2d) 897; Shout v. Gunit Concrete & Construction Co., (1931) 226 Mo. App. 388, 41 S. W. (2d) 629; Hartman v. Union Electric Light & Power Co., (1932) 331 Mo. 230, 53 S. W. (2d) 241; Zarnecke v. Blue Line Chemical Co., (Mo. App. 1932) 54 S. W. (2d) 772; Daggett v. Kansas City Structural Steel Co., (1933) 334

theories or analogies have been used by the courts in the process of interpretation. The Restatement, in the introductory note to Workmen's Compensation, compresses them into three:

"first, as the substitution of a statutory tort for a common law tort; second, as the regulation of the relationship between employer and employee, which is primarily contractual in character; third, as the creation of a new statutory relation between master and servant, the chief incident of which is to impose upon the master financial responsibility for certain risks of the service."

Of these three theories, the first one, the "tort theory," has been used to describe the view taken by a very few courts refusing to apply the local Act to injuries sustained outside the state. The earliest American case, in Massachusetts, took this view.<sup>17</sup> However, in 1927 the Massachusetts Act was amended to permit compensation under certain circumstances.<sup>18</sup> A similar development took place in California<sup>19</sup> and in Illinois.<sup>20</sup> Pennsylvania's

Mo. 207, 65 S. W. (2d) 1036; *Bolin v. Swift & Co.*, (Mo. 1934) 73 S. W. (2d) 774; see *Elsas v. Montgomery Elevator Co.*, (1932) 330 Mo. 596, 50 S. W. (2d) 130. See also *Scott v. White Eagle Oil & Refining Co.*, (D.C. Kans. 1930) 47 F. (2d) 615; *Joseph H. Weiderhoff v. Neil*, (D.C. Mo. 1934) 6 F. Supp. 798; both cases involved Missouri Act.

NORTH DAKOTA—*MacArthur v. No. Dak. Workmen's Compensation Bureau*, (1932) 62 N. D. 572, 244 N. W. 259.

OHIO—*Industrial Commission v. Gardinio*, (1929) 119 Ohio St. 539, 164 N. E. 758, followed in *Johnson v. Industrial Commission*, (1932) 45 Ohio App. 125, 186 N. E. 509. See *infra*, n. 42. For a discussion of an earlier case, see 11 MINNESOTA LAW REVIEW 329, 344, n. 62.

TEXAS—*Price v. Texas Employers' Ins. Ass'n*, (Tex. Comm. App. 1927) 296 S. W. 284; same case on subsequent appeal, *Texas Employers' Ins. Ass'n v. Price*, (Tex. Civ. App. 1927) 300 S. W. 667, writ of error dismissed (1927) 117 Tex. 173, 300 S. W. 672, discussed in (1928) 6 Texas L. Rev. 404; *Norwich Union Indemnity Co. v. Wilson* (Tex. Civ. App. 1929) 17 S. W. (2d) 68, (Tex. Civ. App. 1931) 43 S. W. (2d) 473; *McGuire & Cavender v. Edwards* (Tex. Civ. App. 1932) 48 S. W. (2d) 1010 (see n. 35, *infra*); *Texas Employers' Ins. Ass'n v. Volek*, (Tex. Civ. App. 1932) 44 S. W. (2d) 795, *aff'd* (Tex. Comm. App. 1934) 69 S. W. (2d) 33; *Texas Employers' Ins. Ass'n v. Hoehn*, (Tex. Civ. App. 1934) 72 S. W. (2d) 341; *Davis v. Petroleum Casualty Co.*, (Tex. Civ. App. 1934) 70 S. W. (2d) 649.

VERMONT—*DeGray v. Miller Bros. Const. Co.*, (Vt. 1934) 173 Atl. 556, 562.

<sup>17</sup>*Gould's Case*, (1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D 372, 4 N. C. C. A. 60, followed in *Lemieux v. Boston & Maine R. R.*, (1914) 219 Mass. 399, 106 N. E. 992.

<sup>18</sup>See *Pederzoli's Case*, (1930) 269 Mass. 550, 169 N. E. 427; *McLaughlin's Case*, (1931) 274 Mass. 217, 174 N. E. 338; *Migue's Case*, (1933) 281 Mass. 373; *Armstrong v. Boston and Maine Railroad*, (1931) 276 Mass. 418, 424, 177 N. E. 665; *Wright's Case*, (Mass. 1935) 197 N. E. 5.

<sup>19</sup>See *North Alaska Salmon Co. v. Pillsbury*, (1916) 174 Calif. 1, 162 Pac. 93, L. R. A. 1917E 642 (before amendment); since amendment: *Quong Ham Wah Co. v. Industrial Acc. Comm.*, (1920) 184 Cal. 26, 192 Pac. 1021, 12 A. L. R. 1190, writ of error dismissed, (1921) 255 U. S. 445, 41 Sup. Ct. 373, 65 L. Ed. 723; *Globe Cotton Oil Mills v. Industrial Acc. Comm.*, (1923) 64 Cal. App. 307, 221 Pac. 658; *Alaska Packers' Ass'n*

Act at one time expressly excluded from its operation accidents occurring outside the state, but in 1929 an amendment extended the scope of the Act under quite limited conditions.<sup>21</sup> In 1931 Oklahoma first encountered this problem and interpreted its compulsory Act as not applying to injuries outside the state.<sup>22</sup>

The second theory mentioned seems to refer to the "contract theory" used by many courts in holding the local "elective" Act applicable when the injury occurred outside the state.<sup>23</sup> The theory

*v. Industrial Acc. Comm.*, (1927) 200 Cal. 579, 253 Pac. 926; *Alaska Packers' Ass'n v. Industrial Acc. Comm.*, (1934) 1 Cal. (2d) 250, 34 P. (2d) 716, aff'd (1935) 294 U. S. 532, Sup. Ct. 518, 79 L. Ed. 554.

<sup>20</sup>See *Union Bridge Co. v. Industrial Comm.*, (1919) 287 Ill. 396, 122 N. E. 609 (before amendment); since amendment: *Beall Bros. Supply Co. v. Industrial Commission*, (1930) 341 Ill. 193, 173 N. E. 64; *Johnston v. Industrial Commission*, (1933) 352 Ill. 74, 185 N. E. 191; *Kennedy-Van Saun Mfg. & Eng. Corp. v. Industrial Commission*, (1934) 355 Ill. 519, 189 N. E. 916.

<sup>21</sup>See *Bock v. D. B. Frampton & Co.*, (1932) 106 Pa. Super. 380, 161 Atl. 762.

<sup>22</sup>*Sheehan Pipe Line Const. Co. v. State Industrial Commission*, (1931) 151 Okla. 272, 3 P. (2d) 199. To the same effect: *Continental Oil Co. v. Pitts*, (1932) 158 Okla. 200, 13 P. (2d) 180. Cf. *Associated Indemnity Corporation v. Landers*, (1932) 159 Okla. 190, 14 P. (2d) 950, cited again, *infra* n. 87.

<sup>23</sup>Cases are cited in 11 MINNESOTA LAW REVIEW 329, 337, n. 34; other cases are cited in the text, 11 MINNESOTA LAW REVIEW 329, 337-341. As to express statutory provisions in some states, see n. 16.

Recent cases are:

CONNECTICUT—*Falvey v. Sprague Motor Co.*, (1930) 111 Conn. 693, 151 Atl. 182 (employment began before enactment of Connecticut Act); see *Miller Bros. Const. Co. v. Maryland Casualty Co.*, (1931) 113 Conn. 504, 155 Atl. 709.

IOWA—*Cullamore v. Groneweg & Schoentgen*, (Iowa, 1934) 257 N. W. 561.

LOUISIANA—*Hargis v. McWilliams Co.*, (1928) 9 La. App. 108, 119 So. 88; *Selser v. Bragman's Bluff*, (La. App. 1933) 146 So. 690; see *Festervand v. Laster*, (1930) 15 La. App. 159, 130 So. 634. But cf. *Durrett v. Eichere Woodland Lumber Co.*, (1931) 19 La. App. 494, 136 So. 112, 140 So. 867; *Aboud v. Louisiana Oil Refining Corporation*, (La. App. 1934) 155 So. 484. These cases are cited *infra*, n. 35.

MISSOURI—*State ex rel. Brewen Clark Syrup Co. v. Compensation Commission*, (1928) 320 Mo. 893, 8 S. W. (2d) 897 ("contract" theory used to support application of express provision of Missouri Act; see n. 16); *Shout v. Gunite Concrete & Construction Co.*, (1931) 226 Mo. App. 388, 41 S. W. (2d) 629; *Hartman v. Union Electric Light & Power Co.*, (1932) 331 Mo. 230, 53 S. W. (2d) 241; *Zarneck v. Blue Line Chemical Co.*, (Mo. App. 1932) 54 S. W. (2d) 772; *Daggett v. Kansas City Structural Steel Co.*, (1933) 334 Mo. 207, 65 S. W. (2d) 1036; *Bolin v. Swift & Co.*, (Mo. 1934) 73 S. W. (2d) 774; see *Elsas v. Montgomery Elevator Co.*, (1932) 330 Mo. 596, 50 S. W. (2d) 130.

MONTANA—*State ex rel. Loney v. State Industrial Accident Board*, (1930) 87 Mont. 191, 286 Pac. 408 (also relied on localization of business; see n. 35).

NEW JERSEY—*Hi-Heat Gas Co. v. Dickerson*, (1934) 12 N. J. Misc. 151, 170 Atl. 44, aff'd (1934) 113 N. J. L. 329, 174 Atl. 483; *Sweet v. Austin Co.*, (1934) 12 N. J. Misc. 381, 171 Atl. 684; see *Frank Desiderio*

also has been used, strangely enough, to support recovery under the local Act when the contract of employment was made elsewhere but the injury occurred within the state.<sup>24</sup> The theory, variously expressed by the courts, is based on the idea of an agreement between the employer and employee, in "electing to come under the Act," to make it a part of the contract of employment. The inadequacies of the theory as a matter of contract principles and the absurdities of reasoning in its application have been discussed in the previous article and elsewhere.<sup>25</sup> Moreover, the results reached in states with "compulsory" Acts do not differ greatly from those reached under "elective" Acts.<sup>26</sup> The apt language of the Wisconsin court,<sup>27</sup> quoted in the previous article,<sup>28</sup> is worth repeating:

"Neither, in our opinion, does the fact that the law has an elective feature and is not compulsory materially affect the question. . . .

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Sons & Blunt, (1933) 11 N. J. Misc. 494, 167 Atl. 29.

<sup>1</sup> VERMONT—See dicta in *De Gray v. Miller Bros. Const. Co.*, (Vt. 1934) 173 Atl. 556 ("contract" theory adopted even though express provision in Vermont Act; see n. 16).

<sup>24</sup>See discussion of New Jersey, Connecticut, and Indiana cases in 11 MINNESOTA LAW REVIEW 329, 337-341. See also *DeGray v. Miller Bros. Const. Co.*, (Vt. 1934) 173 Atl. 556, 562-563.

<sup>25</sup>See 11 MINNESOTA LAW REVIEW 329, 337-341, referring to criticisms by other writers. See also (1935) 84 U. of Pa. L. Rev. 85.

<sup>26</sup>It is believed that the statement in the text is justified by a comparison of the results reached under the two types of Acts, as was done in the previous article and, to some extent, in this article.

An interesting case from this angle is *Hilding v. Department of Labor and Industries*, (1931) 162 Wash. 168, 298 Pac. 321. It was the first case before the court on the question of the application of the Washington Act to a workman employed in Washington but injured outside the state. In holding the Act to apply, the court quoted from cases in states with "elective" Acts. One of the quotations used the "contract" theory. Yet Washington is listed as, one of the states having "compulsory" Acts. United States Bureau of Labor Statistics, Bulletin No. 496, *Workmen's Compensation Legislation of the United States and Canada* as of January 1, 1929, at p. 11. The court made no mention of that.

<sup>27</sup>*Anderson v. Miller Scrap Iron Co.*, (1919) 169 Wis. 106, 113, 115, 170 N. W. 275, 171 N. W. 935.

<sup>28</sup>11 MINNESOTA LAW REVIEW 329, 345.

Compare the illuminating statements by the California court with reference to the provision in its "compulsory" Act that the Act should apply to injuries suffered outside the state where the contract was made in the state. *Quong Ham Wah Co. v. Industrial Acc. Comm.*, (1920) 184 Calif. 26, 36, 44, 192 Pac. 1021, 12 A. L. R. 1190, writ of error dismissed (1921) 255 U. S. 445, 41 S. Ct. 373, 65 L. Ed. 723. The statement is quoted in 11 Minn. L. Rev. 329, 335.

Compare also the language of Judge Cardozo, quoted in 11 MINNESOTA LAW REVIEW 329, 343, as to liability under the "compulsory" New York Act, in *Smith v. Heine Safety Boiler Co.*, (1918) 224 N. Y. 9, 119 N. E. 878, Ann. Cas. 1918D 316.



"The liability of the employer under the Act being statutory, the Act enters into and becomes a part of every contract, not as a covenant thereof, but to the extent that the law of the land is a part of every contract."

The third theory may be regarded, perhaps, as implicit in many of the cases. The closest explicit judicial statement probably is that of the Arizona court:<sup>29</sup>

"We therefore hold that the present Workmen's Compensation Act is neither elective nor contractual in its nature, but, on the contrary, that it rests upon the police power *to regulate the status of employer and employee* within the state of Arizona, and that no contract, express or implied, made within or without the state of Arizona, unless expressly so authorized by our law, can of itself affect the rights and duties of such status. It is governed, so far as this subject is concerned, solely by the provisions of the Arizona statutes, and nothing else."

It is not to be supposed that other theories or formulas have not been attempted by courts. The more important ones will be mentioned presently. The common factor in all of the theories is the attempt to find some act or acts, relation or situation within the jurisdiction to which the local Act will attach legal consequences. Sections 198 and 199 suggest that the making of the contract and the injury are the *only* significant facts. The following discussion bears on that suggestion.

One of the most interesting developments since the previous article has been the spreading influence of the Minnesota court's "business localization" theory. This theory was expressed first as follows:<sup>30</sup>

"When a business is localized in a state there is nothing inconsistent with the principle of the Compensation Act in requiring the employer to compensate for injuries in a service incident to its conduct sustained beyond the borders of the state."

The Minnesota court has used this theory consistently.<sup>31</sup> In a number of cases the Minnesota Act was applied where the injury occurred outside of the state. In some of the cases it appears from the report that the contract of employment was made in

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<sup>29</sup>*Ocean Accident & Guarantee Corp. v. Industrial Com.*, (1927) 32 Ariz. 275, 282, 283, 257 Pac. 644. The contract was assumed to have been made in California; the injury occurred in Arizona. The Arizona Act was held to apply.

The opinion contains a good criticism of the "contract" theory.

<sup>30</sup>*State ex rel. Lena Chambers v. District Court*, (1918) 139 Minn. 205, 166 N. W. 185, 3 A. L. R. 1347.

<sup>31</sup>See McClintock, *Minnesota Annotations to the Restatement of Conflict of Laws*, sec. 398 and 399, p. 94-95.

Minnesota, although that fact is not stressed;<sup>32</sup> in some, the place of contract is not mentioned.<sup>33</sup> In one case the theory was used in applying the Minnesota Act where the contract was made outside the state but the injury occurred within the state, the place of injury not being stressed.<sup>34</sup>

In an increasing number of states this "business localization" is regarded as an important factor in determining whether the local Act will be applied.<sup>35</sup>

A somewhat similar theory has been worked out in the more

<sup>32</sup>State ex rel. Chambers v. District Court, (1918) 139 Minn. 205, 166 N. W. 185, 3 A. L. R. 1347 (for subsequent history of this case, see State ex rel. London & Lancashire Indemnity Co. v. District Court, (1919) 141 Minn. 348, 170 N. W. 218); State ex rel. Maryland Casualty Co. v. District Court, (1918) 140 Minn. 427, 168 N. W. 177; State ex rel. McCarthy Bros. v. District Court, (1918) 141 Minn. 61, 169 N. W. 274; Krekelberg v. M. A. Floyd Co., (1926) 166 Minn. 149, 207 N. W. 193.

<sup>33</sup>Stansberry v. Monitor Stove Company, (1921) 150 Minn. 1, 183 N. W. 977, 20 A. L. R. 316 (merely stated that the employee "was employed by the Minneapolis branch"); Bradtmiller v. Liquid Carbonic Co., (1928) 173 Minn. 481, 217 N. W. 680; Brameld v. Albert Dickinson Co., (1932) 186 Minn. 89, 242 N. W. 465.

<sup>34</sup>Ginsburg v. Byers, (1927) 171 Minn. 366, 214 N. W. 55.

<sup>35</sup>INDIANA—Smith v. Menzies Shoe Co., (1934) 98 Ind. App. 132, 188 N. E. 592 (contract made in Illinois; injury in Indiana; employer's principal office in Missouri and no place of business in Indiana; recovery under Indiana Act denied); Finkley v. Eugene Saenger Tailoring Shop, (Ind. App. 1935) 196 N. E. 536.

IOWA—Chicago, Rock Island & Pacific Ry. Co. v. Lundquist, (1928) 206 Iowa 499, 221 N. W. 228 (citing a Minnesota case); but cf. Cullamore v. Groneweg & Schoentgen, (Iowa 1934) 257 N. W. 561, cited supra, n. 23 (in applying Iowa Act, court relied on "contract" theory although employer's principal place of business was in Iowa).

LOUISIANA—Durrett v. Eicher-Woodland Lumber Co., (1931) 19 La. App. 494, 136 So. 112, 140 So. 867 (quoting from a Minnesota case); Abood v. Louisiana Oil Refining Corporation, (La. App. 1934) 155 So. 484. But cf. Hargis v. McWilliams Co., (1928) 9 La. App. 108, 119 So. 88; Festerland v. Laster, (1930) 15 La. App. 159, 130 So. 634; Selser v. Bragman's Bluff, (La. App. 1933) 146 So. 690. These cases are cited supra, n. 23.

MONTANA—State ex rel. Loney v. State Industrial Accident Board, (1930) 87 Mont. 191, 286 Pac. 408 (quoting from Minnesota case; also relying on "contract" theory, see n. 23.)

NEBRASKA—Watts v. Long, (1928) 116 Neb. 656, 218 N. W. 410, 59 A. L. R. 728 (citing Minnesota case; mere fact of the contract being made in Nebraska was not controlling); Skelly Oil Co. v. Gaubenbaugh, (1930) 119 Neb. 698, 230 N. W. 688 (citing, on this point, only a Minnesota case); Freeman v. Higgins, (1932) 123 Neb. 73, 242 N. W. 271; Stone v. Thomson Co., (1932) 124 Neb. 181, 245 N. W. 600; Esau v. Smith Bros., (1933) 124 Neb. 217, 246 N. W. 230 (Nebraska Act applied though contract was made in Kansas); Penwell v. Anderson, (1933) 125 Neb. 449, 250 N. W. 665, noted in (1934) 12 Neb. L. Bull. 275; Rigg v. Atlantic, Pacific & Gulf Oil Co., (Neb. 1935) 261 N. W. 900. These cases show that Nebraska closely approaches the Minnesota "business localization" theory.

TEXAS—See McGuire & Cavender v. Edwards, (Tex. Civ. App. 1932) 48 S. W. (2d) 1010, 1012 (interpreting express provision of Texas Act; see n. 16, supra).

recent New York cases,<sup>36</sup> the emphasis being upon the location of the *employment* rather than the location of the employer's business.<sup>37</sup> In 1930, in *Cameron v. Ellis Const. Co.*,<sup>38</sup> Judge Lehman formulated the theory:

"The test in all cases is the place where the employment is located.

"When the course of employment requires the workman to perform work beyond the borders of the state, a close question may at times be presented as to whether the employment is located here. . . . The facts in each case, rather than juristic concepts, will govern. . . . Occasional transitory work beyond the state may reasonably be said to be work performed in the course of employment here; employment confined to work at a fixed place in another state is not employment within the state, for this state is concerned only remotely, if at all, with the conditions of such employment."

This test has been applied in later New York cases.<sup>39</sup> The difficulties in application are shown by the number of reversed

<sup>36</sup>For a discussion of the earlier New York cases, see 11 MINNESOTA LAW REVIEW 329, 342-344.

<sup>37</sup>This difference in emphasis is pointed out in Judge Lehman's dissenting opinion in *Smith v. Aerovane Utilities Corporation*, (1932) 259 N. Y. 126, 181 N. E. 72, discussed *infra* n. 41.

In Beale, *The Conflict of Laws*, sec. 398.4, p. 1321, it is said: "This present doctrine of the New York courts seems a variety of the localization theory" (the Minnesota theory, discussed in sec. 398.3, p. 1320). However, results reached under the two theories may well differ. See n. 38.

<sup>38</sup>(1930) 252 N. Y. 394, 169 N. E. 622; *remititur* amended, (1930) 253 N. Y. 559, 171 N. E. 782, discussed again *infra*, n. 51. The employer was constructing a road in New York. The employee was employed only for work in Canada, where the injury occurred, in a sand pit which was operated solely to provide sand and gravel for the New York road. Compensation under the New York Act was denied. A different result might be reached in Minnesota. Cf. *Brameld v. Albert Dickinson Co.*, (1932) 186 Minn. 89, 242 N. W. 465, cited *supra*, n. 33 (court said that employee was within the Minnesota Act "though he worked outside the state"). On the other hand, Minnesota probably would agree with the decision of the majority in *Smith v. Aerovane Utilities Corporation*, (1932) 259 N. Y. 126, 181 N. E. 72, discussed *infra*, n. 41.

<sup>39</sup>*Baum v. New York Air Terminals*, (1930) 230 App. Div. 531, 245 N. Y. S. 357 (reversing award); *Copeland v. Foundation Co.*, (1931) 256 N. Y. 568, 177 N. E. 143 (reversal); *Amaxis v. N. A. Vassiluros*, (1931) 232 App. Div. 397, 250 N. Y. S. 201 (dissenting opinion), reversed in (1931) 258 N. Y. 544, 180 N. E. 325; *Proper v. Polley*, (1931) 233 App. Div. 621, 253 N. Y. S. 530 (reversing award; two judges dissenting), *aff'd* (1932) 259 N. Y. 516, 182 N. E. 161 (injury in New York; contract in Pennsylvania); *Kalfatis v. Commercial Printing Co.*, (1931) 233 App. Div. 649, 254 N. Y. S. 519 (reversing award); *Smith v. Aerovane Utilities Corporation*, (1932) 259 N. Y. 126, 181 N. E. 72 (reversal; dissenting opinion; see discussion in n. 41); *Walsh v. Apartment Engineering & Contracting Co.*, (1933) 240 App. Div. 919, 267 N. Y. S. 872 (two judges dissenting); *Zeltoski v. Osborne Drilling Corporation*, (1933) 239 App. Div. 235, 267 N. Y. S. 855 (one judge dissenting), reversed (1934) 264 N. Y. 1, 191

cases and dissenting opinions,<sup>40</sup> and particularly by the 1932 case of *Smith v. Aerovane Utilities Corporation*,<sup>41</sup> in which Judge Lehman dissented.

A somewhat similar test is suggested by the language in recent Ohio<sup>42</sup> and Colorado<sup>43</sup> cases.

The recent Wisconsin cases afford an interesting comparison.<sup>44</sup> In the 1929 case of *Wandersee v. Moskewitz*<sup>45</sup> recovery under the Wisconsin Act was denied for an injury outside the state, even though the contract was made in Wisconsin, because no services under the contract were rendered in that state and hence the

N. E. 532; *Seely v. Phoenix Transit Co.*, (1934) 241 App. Div. 183, 272 N. Y. S. 127.

Compare the following decisions, rendered without opinions or citation of cases: *Hughes v. Waterson, Berlin & Snyder Co.*, (1930) 254 N. Y. 607, 173 N. E. 887; *Matter of Tallman v. Colonial Air Transport, Inc.*, (1932) 259 N. Y. 512, 182 N. E. 159; *Industrial Commissioner v. Underwood, Elliott Fisher Co.*, (1935) 243 App. Div. 658, 276 N. Y. S. 518 (per curiam opinion; no discussion or citation of cases; for later history of this case see (App. Div. 1935) 282 N. Y. S. 229); *Goddard v. Taylor Instrument Co.*, (App. Div. 1935) 282 N. Y. S. 182 (per curiam opinion; no citation of cases).

<sup>40</sup>Reversals and dissenting opinions are indicated in n. 39.

<sup>41</sup>(1932) 259 N. Y. 126, 181 N. E. 72. The employer's principal place of business was in New York; it erected advertising signs throughout the country. The employee had worked for this employer in New York; after short employment with another, he returned to this employer and worked in New York for a few days before he was sent to Pennsylvania, where the injury occurred. The majority held that the New York Act applied. The two opinions seem to show some difference of opinion as to the interpretation of the evidence. The majority opinion quotes evidence that but for the injury the employee would have been employed in New York on his return. Judge Lehman denied that there was any "general employment" in New York.

<sup>42</sup>*Industrial Commission v. Gardinio*, (1929) 119 Ohio St. 539, 164 N. E. 758 (interpreting express provision of Ohio Act, see *supra*, n. 16), followed in *Johnson v. Industrial Commission*, (1932) 45 Ohio App. 125, 186 N. E. 509. For a discussion of an earlier Ohio case, see 11 MINNESOTA LAW REVIEW 329, 344, n. 62.

<sup>43</sup>*Platt v. Reynolds*, (1929) 86 Colo. 397, 282 Pac. 264; *Tripp v. Industrial Commission*, (1931) 89 Colo. 512, 4 P. 2d 917; *Home Insurance Co. v. Hopp*, (1932) 91 Colo. 495, 15 P. (2d) 1082 (place of contract not sole criterion, but where contract is made in Colorado and a "substantial portion" of services performed there, Colorado Act is applied even though injury in another state). Earlier Colorado cases were discussed in 11 MINNESOTA LAW REVIEW 329, 337-338, n. 34.

The later Colorado cases rely much on *Wandersee v. Moskewitz*, (1929) 198 Wis. 345, 223 N. W. 837, cited *infra* n. 45.

<sup>44</sup>The earlier case of *Anderson v. Miller Scrap Iron Co.*, (1919) 169 Wis. 106, 170 N. W. 275, 171 N. W. 935 is cited and quoted from *supra*, n. 27; for a fuller discussion of the case, see 11 MINNESOTA LAW REVIEW 329, 345. That case was followed in *Zurich Accident & Liability Ins. Co. v. Industrial Commission*, (1927) 193 Wis. 32, 213 N. W. 630.

<sup>45</sup>(1929) 198 Wis. 345, 223 N. W. 837. The employee was a resident of Minnesota, but the court did not stress that. The case was distinguished on the facts in *Threshermen's Natl. Ins. Co. v. Industrial Commission*, (1930) 201 Wis. 303, 230 N. W. 67.

Act had not become a part of the contract of employment. In 1930,<sup>46</sup> this doctrine was limited in favor of employees who are Wisconsin residents in order to protect the state's interest in its residents and their dependents. The court spoke of a "constructive status" under the Wisconsin Act being created until the employee acquired an "actual status as an employee in some other state" (apparently by changing residence). A year later<sup>47</sup> the court said that this "constructive status" must mean that constructively the services are being performed in Wisconsin and raised the question of whether the status was fiction or reality. In 1933<sup>48</sup> the court said that if the constructive status is a fiction, it is justifiable in order to protect the employee and to protect the state "from the consequences of pauperism."

To return to sections 198 and 199 of the Restatement, the foregoing discussion of the cases shows that there is ample authority, on one theory or another, or by express statutory provision, for the statements that the local Act may be applied when the contract of employment was made in the state or the harm was sustained there. However, the inference from these sections that those are the *only* significant facts simply is not true in a growing number of states.

Must at least one of those facts exist for the local Act to be applied? Section 400 flatly states that it must. The same statement is made in Professor Beale's treatise,<sup>49</sup> citing four cases. Two of those cases are relatively early New York decisions by lower courts.<sup>50</sup> The later New York cases discussed above do

<sup>46</sup>Val Blatz Brewing Co. v. Gerard, (1930) 201 Wis. 474, 230 N. W. 622, discussed in (1930) 6 Wis. L. Rev. 61. The contract was made in Wisconsin for services entirely outside the state. The case was remanded to the Industrial Commission in order to have findings on the matter of "status."

<sup>47</sup>Interstate Power Co. v. Industrial Commission, (1931) 203 Wis. 466, 477, 234 N. W. 889. The actual holding of this case was to apply the Wisconsin Act to an injury which occurred in Wisconsin during temporary work under a contract made in Iowa. Other aspects of this case are discussed *infra*, n. 86.

<sup>48</sup>McKesson-Fuller-Morrison Co. v. Industrial Commission, (1933) 212 Wis. 507, 514, 250 N. W. 396. The actual holding of the case is discussed *infra*, n. 56.

<sup>49</sup>2 Beale, The Conflict of Laws, sec. 401.1, p. 1322.

<sup>50</sup>Thompson v. Foundation Co., (1919) 188 App. Div. 506, 177 N. Y. S. 58. This case was cited in the previous article as holding that "there can be no recovery under the Act when the contract was not made in New York and the injury was abroad." 11 MINNESOTA LAW REVIEW 329, 343, n. 59. The injury was in Pennsylvania. The majority opinion discussed only whether the contract was made in New York, the award for the employee having been granted solely on that basis. Thus the proposition was assumed rather than discussed. The theory of the earlier New York

not emphasize the place of contract as much as the earlier cases did in determining whether the New York Act applies to injuries outside the state.<sup>51</sup> Another case cited is a 1925 Indiana case from an intermediate appellate court.<sup>52</sup> The court in that case stressed the fact that the contract was neither made nor to be performed in Indiana. The fourth case cited is a 1919 case from an intermediate appellate court of Ohio<sup>53</sup> in which the court relied in part on the fact that no work was to be done by the employee in Ohio. A stronger case, which might have been cited, is a 1932 Maryland decision<sup>54</sup> which relied on this section of the Restatement in its then form.<sup>55</sup> On the other hand, a 1933 Wisconsin case<sup>56</sup> seems directly contra.

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cases gave support to the assumption. See 11 MINNESOTA LAW REVIEW 329, 342-343.

The other case cited is *Baggs v. Standard Oil Co.*, (Sup. Ct., Special Term, 1920) 180 N. Y. S. 560, cited in, 11 MINNESOTA LAW REVIEW 329, 344, n. 61. The court (one judge) said, "But where the injured party is not a resident of this state, and where he was not hired within the state, and where he rendered no service within the state, the . . . Act does not apply."

<sup>51</sup>In *Cameron v. Ellis Const. Co.*, (1930) 252 N. Y. 394, 169 N. E. 622, remittitur amended (1930) 253 N. Y. 559, 171 N. E. 782, discussed supra, n. 38; it is not even stated in the report where the contract was made. More emphasis, however, was placed on the place of contract, along with other factors, in *Smith v. Aerovane Utilities Corporation*, (1932) 259 N. Y. 126, 181 N. W. 72, discussed supra, n. 41.

<sup>52</sup>*Bemont Oil Corporation v. Cubbison*, (1925) 84 Ind. App. 22, 149 N. E. 919, discussed in 11 MINNESOTA LAW REVIEW 329, 340, n. 46.

The Indiana cases are quite confusing. The earlier cases are discussed in 11 MINNESOTA LAW REVIEW 329, 339-341. Recent cases are: *Bishop v. International Sugar Feed Co.*, (1928) 87 Ind. App. 509, 162 N. E. 71 (following *Darsch v. Thearle, Duffield, etc. Co.*, (1922) 77 Ind. App. 357, 133 N. E. 525, discussed in 11 MINNESOTA LAW REVIEW 329, 340, n. 44); *Premier Const. Co. v. Grinstead*, (1930) 91 Ind. App. 163, 170 N. E. 561 (general contract of employment made in Indiana to work wherever work happened to be; employee lived in Kentucky and was directed to go on a job to Kentucky where the injury occurred; Indiana Act held not to apply); *Smith v. Menzies Shoe Co.*, (1934) 98 Ind. App. 132, 188 N. E. 592, cited supra, n. 35.

<sup>53</sup>*Industrial Commission v. Ware*, (1919) 10 Ohio App. 375, discussed in 11 MINNESOTA LAW REVIEW 329, 344, n. 62. The more recent Ohio cases are cited in n. 16 and n. 42.

<sup>54</sup>*Liggett & Myers Tobacco Co. v. Goslin*, (1932) 163 Md. 74, 83-84, 160 Atl. 804, cited supra n. 16 (interpreting express provision of Maryland Act).

<sup>55</sup>Proposed Final Draft No. 3, March 10, 1932, section 438. This section was practically the same as the present section 400.

<sup>56</sup>*McKesson-Fuller-Morrison Co. v. Industrial Commission*, (1933) 212 Wis. 507, 511-513, 250 N. W. 396, cited supra, n. 48. The injury occurred in Illinois. It was contended that the contract was made in Illinois. The court answered that it made no difference where the contract was made. See also dicta in *Val Blatz Brewing Co. v. Gerard*, (1930) 201 Wis. 474, 481, 230 N. W. 622, discussed in (1930) 6 Wis. L. Rev. 61, cited supra, n. 46.

The full rigor of section 400 is softened somewhat by a comment to section 398:

"a. *Employment through agency.* The case of employment through an employment agency in one state, where the entire business is carried on in another state, and the applicant is merely sent to the principal office to report, is specially treated. In such a case, the relation is regarded as established not by the action of the agency, but by the workman reporting for work at the principal office of the business, the transaction at the employment office not being regarded as definitive hiring. In that case, the Compensation Act of the state where the workman reports for duty governs compensation."

It is often a difficult problem, of course, to determine in which state the contract of employment was made.<sup>57</sup> The position taken by the comment seems highly sensible (even though it may depart in some situations from the technical rules as to the "place of contracting,")<sup>58</sup> at least to the extent that it permits the Act of the place where the work is actually done to be applied.<sup>59</sup>

However, the comment is limited in scope. It does not go to the heart of the problem of section 400. Suppose this situation: the employer's principal place of business is in State X, but some business is carried on in States Y and Z; the employee is hired in Y under an agreement to go where he is sent; he works for a short time in Y and then is sent to X where he is put to work on a job of a permanent nature which he carries on for a long time; in an emergency he is sent to Z on a temporary

<sup>57</sup>See, for example, *Daggett v. Kansas City Structural Steel Co.*, (1933) 334 Mo. 207, 65 S. W. (2d) 1036 (see discussion *infra*, n. 59); *Leininger v. Jacobs*, (Mich. 1934) 257 N. W. 764 (application for employment made in Michigan; employer later telephoned from Michigan instructions to foreman in employer's Ohio garage to put employer to work; telephone message regarded as "acceptance" in Michigan so as to make a "Michigan contract"); *Los Angeles & S. L. R. Co. v. Industrial Accident Commission*, (1935) 2 Cal. (2nd) 685, 43 P. (2d) 283 (authority of California agent to make contract for work outside the state); *Radford v. Smith Bros.*, (1932) 123 Neb. 13, 241 N. W. 753 (new contract of employment held to have been made in Nebraska); *Davis v. Jacob Dold Packing Co.*, (1934) 140 Kans. 644, 38 P. (2d) 107; *Rigg v. Atlantic, Pacific & Gulf Oil Co.*, (Neb. 1935) 261 N. W. 900.

<sup>58</sup>See Restatement, Conflict of Laws, sec. 311 and 328.

<sup>59</sup>It does not follow that the Act of the state of contracting might not be applicable also, at least where other factors exist. *Daggett v. Kansas City Structural Steel Co.*, (1933) 334 Mo. 207, 65 S. W. (2d) 1036 (contract regarded as made in Missouri through fellow applicant for work as employer's agent; employee reported for work in Kansas, where he was injured; Missouri Act applied on basis of express provision plus fact that employer was a "major employer" in Missouri); *Los Angeles & S. L. R. Co. v. Industrial Accident Commission*, (1935) 2 Cal. (2nd) 685, 43 P. (2d) 282 (similar situation).

piece of work with instructions to return to X when the work is finished; he is injured in Z. If X were Minnesota or New York, or one of the states tending to take similar views, it is asserted with some confidence, on the basis of the recent cases discussed above, that X would apply its Act to the injury, section 400 to the contrary notwithstanding.

This discussion of when the local Act will be applied is not complete without a consideration of constitutional limitations which will be treated, among other matters, under the next heading.

### III. EFFECT OF REMEDY UNDER ACT OF A STATE UPON REMEDIES IN THE SAME OR OTHER STATES—CONSTITUTIONAL LIMITATIONS.

The pertinent sections of the Restatement are:

"Sec. 401. Abolition of right of action for common law tort or wrongful death.

"If the cause of action in tort or an action for wrongful death either against the employer or against a third person has been abolished by a Workmen's Compensation Act of the place where the contract of employment was made or of the place of wrong, no action can be maintained for such tort or wrongful death in any state.

"Sec. 402. Effect of two acts governing injury.

"Proceedings may be brought in a state under the Workmen's Compensation Act of that state, if it is applicable, although the Act of another state also is applicable."

Where the Act of the state of injury applies and purports to provide an exclusive remedy, there is considerable authority that a tort action,<sup>60</sup> or an action for wrongful death,<sup>61</sup> will not lie in

<sup>60</sup>*Albanese v. Stewart*, (1912) 78 Misc. Rep. 581, 138 N. Y. S. 942; *Wasilewski v. Warner Sugar Refining Co.*, (1914) 87 Misc. Rep. 156, 149 N. Y. S. 1035 (contract and injury both in New Jersey; court stressed place of contract); *Pendar v. H. & B. American Mach. Co.*, (1913) 35 R. I. 321, 87 Atl. 1, L. R. A. 1916A 428, 4 N. C. C. A. 600; *Johnson v. Nelson*, (1915) 128 Minn. 158, 150 N. W. 620; *Christ v. Chicago & Northwestern Ry. Co.*, (1929) 176 Minn. 592, 224 N. W. 247; *Bonner v. Tucker Stevedoring Co.*, (1916) 25 Pa. Dist. Rep. 600; *Mitchell v. St. Louis Smelting & Refining Co.*, (1919) 202 Mo. App. 251, 215 S. W. 506; *Taylor v. Integrity Mut. Cas. Co.*, (1924) 216 Mo. App. 599, 265 S. W. 881; *Bozo v. Central Coal & Coke Co.*, (1919) 54 Utah 289, 180 Pac. 432, (1920) 57 Utah 243, 193 Pac. 1111 (point assumed without discussion); *Shurtliff v. Oregon Short Line R. Co.*, (1925) 66 Utah 161, 241 Pac. 1058 (point assumed); *Magnolia Petroleum Co. v. Turner*, (1933) 188 Ark. 177, 65 S. W. (2d) 1 (contract, service thereunder, and injury all in Texas); *Cox v. Missouri Pac. R. Co.*, (1933) 332 Mo. 991, 61 S. W. (2d) 962. Contra, *Johnson v. C. C. & O. Ry. Co.*, (1926) 191 N. C. 75, 131 S. E. 390, discussed in 11 MINNESOTA LAW REVIEW 329, 349 (both contract and injury in Tennessee; plaintiff a resident of North Carolina), followed in *Lee v.*



another state. This would seem to follow from the usual rule that tort liability is governed by the law of the place of injury,<sup>62</sup> and most of the cases so argue. Less clear is the situation where the Act of a state other than the state of injury applies, and the cases have reached divergent results.<sup>63</sup> Of course, where the court finds that the Act of no state applies to the injury, other relief will be granted.<sup>64</sup>

A new element was introduced into the problem when the United States Supreme Court, in 1932, in *Bradford Electric*

*Chemical Construction Co.*, (1931) 200 N. C. 319, 156 S. E. 848.

Compare *Beyer v. Hamburg-American S. S. Co.*, (C.C. N.Y. 1907) 171 Fed. 582 (involving German compensation law).

<sup>61</sup>*Prdich v. N. Y. Cent. R. Co.*, (1920) 111 Misc. Rep. 430, 183 N. Y. S. 77; see *Floyd v. Vicksburg Cooperage Co.*, (1930) 156 Miss. 567, 126 So. 395; cf. *Anderson v. Standard Oil Co. of N. J.*, (1925) 124 Misc. 829, 209 N. Y. S. 493; *Resigno v. F. Jarka Co.*, (1927) 221 App. Div. 214, 223 N. Y. S. 5.

<sup>62</sup>Restatement, Conflict of Laws, sec. 378, 384 (2), 391 (wrongful death).

<sup>63</sup>Cases denying other relief are: *Barnhart v. American Concrete Steel Co.*, (1920) 227 N. Y. 531, 125 N. Y. 675, discussed in 11 MINNESOTA LAW REVIEW 329, 348 (action under wrongful death statute of New York, where fatal injury occurred, held barred by provisions of "optional" Act of New Jersey, where contract was made, the employee having "accepted" the provisions of the Act); *Anderson v. Miller Scrap Iron Co.*, (1919) 169 Wis. 106, 170 N. W. 275, 171 N. W. 935, discussed in 11 MINNESOTA LAW REVIEW 329, 351 (recovery under survival statute of Michigan, where injury occurred, denied because Act of Wisconsin, where the contract was made, applied). See *Scott v. White Eagle Oil & Refining Co.*, (D.C. Kans. 1930) 47 F. (2d) 615.

Cases granting other relief are: *Farr v. Babcock Lumber Co.*, (1921) 182 N. C. 725, 109 S. E. 833, discussed in 11 MINNESOTA LAW REVIEW 329, 348 (tort action allowed in North Carolina in spite of Act of Tennessee, where contract was made; court's language in terms of construction of Tennessee Act, but the later North Carolina cases, cited in n. 60, have gone further); *Standard Pipe Line Co. v. Burnett*, (1933) 188 Ark. 491, 66 S. W. (2d) 637 (contract, made in Louisiana, provided that Louisiana Act only should determine liability for injuries; tort action allowed in Arkansas, where injury occurred).

Compare cases involving Acts of foreign countries. *Schweitzer v. Hamburg-Am. Line*, (1912) 78 Misc. Rep. 448, 138 N. Y. S. 944; *The Falco* (D.C. N.Y. 1926) 15 F. (2d) 604 (in admiralty).

The cases cited above do not include cases based upon the full faith and credit and due process clauses, which are discussed below.

<sup>64</sup>*Hamm v. Rockwood Sprinkler Co.*, (1916) 88 N. J. L. 564, 97 Atl. 730 (contract and injury in New York; tort action not barred by New Jersey Act which did not apply); *Reynolds v. Day*, (1914) 79 Wash. 499, 140 Pac. 681, L. R. A. 1916A 432, 5 N. C. C. A. 814 (action for damages for injury in Idaho not barred by "public policy" of Washington Act); *Cogliano v. Ferguson*, (1917) 228 Mass. 147, 117 N. E. 45 (Massachusetts Act did not apply to injury in Maine and hence did not bar tort action).

Compare *Marra v. Hamburg-Am. P. A. Gesellschaft*, (1917) 180 App. Div. 75, 167 N. Y. S. 74 (involving German Act).

*Light Co. v. Clapper*,<sup>65</sup> invoked the full faith and credit clause of the federal constitution. That case was an action, removed to the federal court, for damages brought by the employee's administratrix under the New Hampshire Employers' Liability and Workmen's Compensation Act which provided for such an action or for compensation at the election of the employee. The employer, a citizen and resident of Vermont, had its principal place of business there and lines extending into New Hampshire. The employee, a resident of Vermont, was employed there for service in either state; he was sent to New Hampshire to restore some fuses and was killed while so doing. The Vermont "elective" Act expressly provided for compensation for injuries outside the state and for a presumed agreement that the remedy under the Act should be exclusive. Neither party "elected" to reject the Act by filing the necessary statement. Mr. Justice Brandeis, delivering the opinion of the court, held that, under the full faith and credit clause, the New Hampshire courts could not "disregard the rights of the parties as determined by the laws of Vermont." Mr. Justice Stone concurred on the ground that it could be assumed that the New Hampshire courts would apply the Vermont Act, but he doubted whether the full faith and credit clause would compel that result. The opinion of Mr. Justice Brandeis was rather guarded, as shown by its concluding sentence:

"We have no occasion to consider whether if the injured employee had been a resident of New Hampshire, or had been continuously employed there, or had left dependents there, recovery might validly have been permitted under New Hampshire law."

The *Clapper Case* was distinguished a year later in *Ohio v. Chattanooga Boiler & Tank Co.*<sup>66</sup> on the ground that the Tennessee Act, there involved, as construed by the highest court of Tennessee, did not preclude recovery under the Act of another state, Ohio. It has been pointed out with reason by Professor Beale<sup>67</sup> that there may have been a misunderstanding of the Tennessee case<sup>68</sup> which merely held that the proceeding for compensation in Tennessee would be dismissed because the claimant had obtained

<sup>65</sup>(1932) 286 U. S. 145, 52 Sup. Ct. 571, 76 L. Ed. 1026, 82 A. L. R. 696.

<sup>66</sup>(1933) 289 U. S. 439, 53 Sup. Ct. 663, 77 L. Ed. 1307.

<sup>67</sup>Beale, Two Cases on Jurisdiction, (1935) 48 Harv. L. Rev. 620, 622; 2 Beale, Conflict of Laws, sec. 401.2, p. 1325-1326.

<sup>68</sup>*Tidwell v. Chattanooga Boiler & Tank Co.*, (1931) 163 Tenn. 420, 648, 43 S. W. (2d) 221, 45 S. W. (2d) 528.

an award, on which some payments had been made, under the Ohio Act.

Section 401 of the Restatement clearly is based, in part, upon the *Clapper Case*. Comment b to that section states:

"*Effect of Constitution of United States.* If the Compensation Act of the state where the contract of employment is made abolishes the common law or statutory right of action either as a result of the fact that the employment was entered into in that state or by reason of the election of the parties to come within the operation of that Act, no action can be maintained in any state irrespective of where the workman was injured or killed. This result is required as between states of the United States under the full faith and credit clause of the constitution."

The *Clapper Case*, its implications, its relation to other branches of conflict of laws, and its desirability have been discussed ably by Professor Beale and others.<sup>69</sup> Suffice it to say here that the Restatement treats the case broadly in one respect and narrowly in another. The broad treatment consists in recognizing the act of making the contract as *alone* sufficient for the application of the doctrine. This certainly is questionable in view of the carefully restricted language of Mr. Justice Brandeis quoted above and in view of the facts of the case, e. g., that the employer's principal place of business was in Vermont. The narrow treatment consists in limiting the doctrine to the abolition of tort or wrongful death remedies. This is the clear inference from section 401 and section 402 taken together. Specifically, doesn't the doctrine of the *Clapper Case* include also remedies under workmen's compensation Acts of other states? The language of the case itself does not exclude such a possibility. The *Chattanooga Case* seems to indicate that the doctrine would have precluded a remedy under the Ohio Act but for the supposed limiting construction of the Tennessee Act by the Tennessee court. Furthermore, the cases in lower federal courts and in the state courts have not treated the doctrine so narrowly.

Those cases which have cited the *Clapper Case* are fairly numerous. Some of them are worth special mention.<sup>70</sup> In an

<sup>69</sup>Beale, Two Cases on Jurisdiction, (1935) 48 Harv. L. Rev. 620, 622; 2 Beale, Conflict of Laws, sec. 401.2, p. 1323-1326; Dunlap, The Conflict of Laws and Workmen's Compensation, (1935) 23 Cal. L. Rev. 381. See also the following notes: (1932) 32 Col. L. Rev. 131; (1932) 42 Yale L. J. 115; (1933) 27 Ill. L. Rev. 573; (1932) 11 No. Car. L. Rev. 116; (1932) 46 Harv. L. Rev. 291; (1934) 43 Yale L. J. 648, 649. See also Lorenzen and Heilman, The Restatement of the Conflict of Laws, (1935) 83 U. of Pa. L. Rev. 555, 580.

<sup>70</sup>See also *Magnolia Petroleum Co. v. Turner*, (1933) 188 Ark. 177,

Illinois case,<sup>71</sup> involving facts very similar to those in the *Clapper Case*, an award to the employee's widow under the Illinois Act was refused on the ground that the only remedy was under the Indiana Act, on the authority of the *Clapper Case*. Likewise, a federal district court<sup>72</sup> of Missouri enjoined the Missouri workmen's compensation commission from taking jurisdiction, thus compelling it to give full faith and credit to the Illinois Act under the doctrine of the *Clapper Case*. On the other hand, the *Clapper Case* was regarded as distinguishable in a Nebraska case<sup>73</sup> and as not preventing the application of the Nebraska Act in spite of the provisions of the Act of Kansas where the contract was made. The Nebraska court referred as "cautionary" to the last sentence, quoted above, of the opinion of Mr. Justice Brandeis, talked of "our public policy," and emphasized the fact that the corporate employer, while domiciled in Texas, had its only headquarters for the conduct of the industry at the time of the accident in Nebraska, where the industry was being carried on and where the employee resided and was injured. Similarly, the court in a Missouri case<sup>74</sup> regarded the *Clapper Case* as supporting rather than preventing an award under the Act of Missouri, where the contract was made, the injury occurring in Kansas. The court considered the contention that, under the full faith and credit and due process clauses of the federal Constitution and the *Clapper Case*, one state could not "seize upon some act casually occurring within its jurisdiction" as a means of applying its Act in denial of the application of the Act of another state where "all the permanent,

65 S. W. (2d) 1, cited supra, n. 60; *Henriksen, v. Crandic Stages*, (1933) 216 Iowa 643, 246 N. W. 913, cited infra, n. 97; *Bolin v. Swift & Co.*, (Mo. 1934) 73 S. W. (2d) 774, cited supra, n. 16 and 23; *McKesson-Fuller-Morrison Co. v. Industrial Commission*, (1933) 212 Wis. 507, 250 N. W. 396, cited supra n. 48 and 56, and infra, n. 83; *Ford, Bacon & Davis v. Volentine*, (C.C.A. 5th Cir. 1933) 64 F. (2d) 800, cited supra, n. 10, infra, n. 106; *Betts v. Southern Ry. Co.*, (C.C.A. 4th Cir. 1934) 71 F. (2d) 787, cited infra, n. 100; *Orleans Dredging Co. v. Frazie*, (Miss. 1935) 161 So. 699; *De Gray v. Miller Bros. Const. Co.*, (Vt. 1934) 173 Atl. 556.

Compare following cases decided before the *Clapper Case*: *Beall Bros. Supply Co. v. Industrial Commission*, (1930) 341 Ill. 193, 173 N. E. 64; *American Mut. Liability Co. v. McCaffrey*, (C.C.A. 5th Cir. 1930) 37 F. (2d) 870, cert. denied (1930) 281 U. S. 751, 50 S. Ct. 354, 74 L. Ed. 1162.

<sup>71</sup>*Cole v. Industrial Commission*, (1933) 353 Ill. 415, 187 N. E. 520, 90 A. L. R. 116.

<sup>72</sup>*Joseph H. Weiderhoff v. Neal*, (D.C. Mo. 1934) 6 F. Supp. 798.

<sup>73</sup>*Esau v. Smith Bros.*, (1933) 124 Neb. 217, 246 N. W. 230, cited supra, n. 35.

<sup>74</sup>*Daggett v. Kansas City Structural Steel Co.*, (1933) 334 Mo. 207, 65 S. W. (2d) 1036. Cf. *Migue's Case*, (1933) 281 Mass. 373, 183 N. E. 847.

intended, and important elements of the employment are located." The court said that it had no fault to find with this contention, but denied that such was the situation in the case since not only was the contract made in Missouri but also the employer was a "major employer operating under" the Missouri Act.

The United States Supreme Court entered the field again in 1935, in *Alaska Packers Ass'n v. Industrial Accident Commission of California*,<sup>75</sup> decided *after* the publication of the Restatement and of Professor Beale's treatise. The employee, a nonresident alien, and the employer, doing business in California, executed in California a written contract of employment. The employee agreed to work in Alaska during the salmon canning season; the employer agreed to transport him to Alaska, and, at the end of the season, to return him to California where he was to be paid his wages, less advances. The contract provided that the parties should be subject to the Alaska Act. The "compulsory" California Act expressly provided for compensation for injuries outside the state "where the injured employee is a resident of this state at the time of the injury and the contract of hire was made in this state." It had been held in California that this provision applied to nonresidents on the ground that the privileges and immunities clause of the federal Constitution prevented giving effect to the requirement that the employee be a resident.<sup>76</sup> The California Act also expressly provided that no contract should exempt the employer from liability under the Act. The Alaska "elective" Act provided for suit in the courts of the territory, brought in the judicial division where the injury occurred.<sup>77</sup> On his return from Alaska, the employee received an award under the California

<sup>75</sup>(U.S. 1935) 55 Sup. Ct. 518, discussed ably in Dunlap, *The Conflict of Laws and Workmen's Compensation*, (1935) 23 Cal. L. Rev. 381; see also (1935) 35 Colum. L. Rev. 751.

<sup>76</sup>*Quong Ham Wah Co. v. Industrial Acc. Comm.*, (1920) 184 Calif. 26, 192 Pac. 1021, 12 A. L. R. 1190, writ of error dismissed, (1921) 255 U. S. 445, 41 S. Ct. 373, 65 L. Ed. 723. See also on this point *Bement Oil Corporation v. Cubbison*, (1925) 84 Ind. App. 22, 149 N. E. 919; *Roberts v. I. X. L. Glass Corporation*, (1932) 259 Mich. 644, 244 N. W. 188; but see *Liggett & Myers Tobacco Co. v. Goslin*, (1932) 163 Md. 74, 160 Atl. 804. Strictly speaking, the *Quong Ham Wah* case decided only as to citizens of other states, but the case was regarded as applying to *all* nonresidents in the *Alaska Packers* case. For a critical discussion of that point, see (1935) 23 Cal. L. Rev. 449.

<sup>77</sup>The Alaska Act also forbade suit under the Act outside Alaska except where service on the defendant could not be obtained in Alaska. In this case service could be obtained in Alaska. It was contended in the United States Supreme Court that the limitation on suits outside Alaska was invalid, and the Court so assumed. 55 Sup. Ct. 518, 523. For a discussion of that question, see 11 MINNESOTA LAW REVIEW 329, 331.

Act. The award was affirmed by the California Supreme Court<sup>78</sup> in an able opinion which cited sections 398 and 399 of the Restatement and quoted section 398 and comment a to that section.<sup>79</sup> The opinion also stated that the *Clapper Case* and the *Chattanooga Case* left open the question of the applicable law where the state of injury is the state where the "major incidents of the employment are located"<sup>80</sup> and did not attempt to decide the question except as required by the case before it.

On appeal to the United States Supreme Court, the award was again affirmed, Mr. Justice Stone delivering the opinion of the court. The opinion considered at length the effect on the case of the due process and full faith and credit clauses of the federal constitution.

With regard to the due process clause, the Court said:

" . . . where the contract is entered into within the state, even though it is to be performed elsewhere, its terms, its obligation, and its sanctions are subject, in some measure, to the legislative control of the state. . . .

"Objections which are founded upon the Fourteenth Amendment must . . . be directed, not to the existence of the power to impose liability for an injury outside state borders, but to the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process."

The court concluded that the application of the California Act to this case was not "unreasonable" in the constitutional sense and that the provision of the Act against contract stipulations exempting the employer from liability was valid, emphasizing the seasonal nature of the employment rendering application for compensation in Alaska improbable and also stressing the fact that the employee was to return to California with the consequent danger of becoming a public charge.<sup>81</sup> A caveat was entered, however, to the effect that it was unnecessary to consider what the effect would be of the parties being domiciled in Alaska or of

<sup>78</sup>(1934) 1 Cal. (2d) 250, 34 P. (2d) 716, discussed in (1935) 44 Yale L. J. 869.

<sup>79</sup>The citations were to Restatement of Conflict of Laws, Proposed Final Draft No. 4 (1934), sections 434 and 436. Those sections are identical with the present sections 398 and 399. The citation to comment a was to Restatement of Conflict of Laws, Proposed Final Draft No. 3, section 434, comment a, which is practically identical with the present comment a, quoted *supra*, p. 32, to section 398.

<sup>80</sup>This phrase apparently was adapted from a similar phrase used in a note in (1932) 46 Harv. L. Rev. 291, 298. This note was cited in the same paragraph of the opinion.

<sup>81</sup>Compare the similar emphasis on the danger of pauperism in the state in some of the recent Wisconsin cases, discussed *supra*, p. 30.

their relationship to California being such as to give it a "lesser interest in protecting the employee."

In considering the effect of the full faith and credit requirement, the court assumed that it is made applicable to territorial statutes by the federal statutes. The court's approach to the problem is indicated by the following excerpt from the opinion:

"Prima facie every state is entitled to enforce in its own state its own statutes, lawfully enacted. One who challenges that right, because of the force given by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and, again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other."

The court concluded that the interest of Alaska was not shown to be superior to that of California. After pointing out the differences between this case and the *Clapper Case*, the court declined to inquire into the question whether the California Act could be denied any effect in Alaska.

The *Alaska Packers Case* already has begun to exercise an influence. In a case in the court of appeals for the District of Columbia<sup>82</sup> the contract was made in Alabama; the employment was in that state, in other states, and finally in the District of Columbia where the fatal injury occurred. The "elective" Alabama Act expressly applied and provided for an exclusive remedy. The District of Columbia Act also contained exclusive provisions. "Applying the rule declared in the *Alaska Packers Case*," the court held that the District of Columbia Act could be applied, emphasizing the fact that the contract of employment contemplated service in other states, that the employee was not a resident of Alabama where his period of actual service was brief, that he had worked for several months in the District, and that his wife and children were not living in Alabama. The court argued that the District had a legitimate public interest to impose liability and provide a remedy; to require the employee to go to Alabama for redress would involve time and expense and might cause the employee to become a public charge.

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<sup>82</sup>United States Casualty Co. v. Hoage, (App. D.C. 1935) 77 F. (2d) 542, discussed in (1935) 49 Harv. L. Rev. 146.

These developments since the *Clapper Case* and particularly since the publication of the Restatement show quite clearly that the Restatement's treatment of the doctrine of the *Clapper Case* is both too broad and too narrow in the respects discussed above, i. e., in the recognition of the act of making the contract as alone sufficient and in the limitation to the abolition of tort or wrongful death remedies.

#### IV. EFFECT OF PREVIOUS AWARD.

It is apparent from the foregoing discussion that it is quite possible for the Act of more than one state to apply to an injury, even under the recent United States Supreme Court cases. That situation requires adjustment of awards under the Acts. The Restatement says:

"Sec. 403. Effect of Previous Award.

"Award already had under the Workmen's Compensation Act of another state will not bar a proceeding under an applicable Act, but the amount paid on a prior award in another state will be credited on the second award."

This is the only sensible way of handling the problem, and there is considerable authority to support it.<sup>83</sup> The best exposition of the view is in *Hughey v. Ware*,<sup>84</sup> a 1929 New Mexico case. In refusing to allow full compensation under the New Mexico Act after the employee had procured an award and some payments under the Texas Act, the court said:

"There was but one accident. It is the public policy of this state that, for such accident, compensation shall be made in a certain amount, to secure the injured employee against want, and to avoid his becoming a public charge. The employer is required to carry compensation insurance. This is a device to place upon the industry as a whole the cost of the prescribed compensation. In the case at bar . . . the industry has already borne the cost imposed upon it by Texas law. That may be more or less than under our law. But if both laws may be invoked, the charge im-

<sup>83</sup>The New York cases, which lend some support to this view but are in some confusion, are discussed in 11 MINNESOTA LAW REVIEW 329, 346. Other cases supporting this view are: *McLaughlin's Case*, (1931) 274 Mass. 217, 174 N. E. 338; *Migue's Case*, (1933) 281 Mass. 373, 183 N. E. 847; see *Interstate Power Co. v. Industrial Commission*, (1931) 203 Wis. 466, 234 N. W. 889; *McKesson-Fuller-Morrison Co., v. Industrial Commission*, (1933) 212 Wis. 507, 250 N. W. 396.

Compare somewhat analogous situations in *Sweet v. Austin Co.*, (1934) 12 N. J. Misc. 381, 171 Atl. 684; *Shout v. Gunit Concrete and Construction Co.*, (1931) 226 Mo. App. 388, 41 S. W. (2d) 629; *American Mut. Liability Co. v. McCaffrey*, (C.C.A. 5th Cir. 1930) 37 F. (2d) 870, cert. denied (1930) 281 U. S. 751, 50 S. Ct. 354, 74 L. Ed. 1162.

<sup>84</sup>(1929) 34 N. M. 29, 276 Pac. 27.



posed upon the industry by the public policy of either state will be exceeded. . . .

"We need not decide whether appellant [the employee], by invoking Texas law, irrevocably renounced all rights under New Mexico law. We cannot doubt that what he has received under the Texas award is chargeable to him, and to be credited to the industry upon which the expense ultimately falls, as though voluntarily paid and accepted."

The court referred to a dictum in an early New Jersey case<sup>85</sup> that "recovery of compensation in two states is no more illegal, and is not necessarily more unjust than recovery upon two policies of accident or life insurance." The New Mexico court answered thus:

"This analogy is false. Public policy has not as yet concerned itself with the amount of accident insurance one may carry at his own expense. It is concerned with the amount of compensation, because the cost, originally chargeable to his employer, is passed on, in theory at least, to society, by the addition it makes to the cost of producing what the public consumes."

This argument would seem to apply even where the compensation payments are to the state in the absence of dependents of the employee,<sup>86</sup> although the factor of double recovery by the same person is not present.

Other views have been taken. It has been held in Tennessee that the institution of proceedings in Ohio constituted a renunciation of the "contract" which included the Tennessee "elective" Act and an "election" which became irrevocable when the benefit of the Ohio proceedings was taken by receiving payments.<sup>87</sup> The

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<sup>85</sup>*Rounsaville v. Central R. R. Co.*, (1915) 87 N. J. L. 371, 374, 94 Atl. 392. For the subsequent disposition of this case, see (1917) 90 N. J. L. 176, 101 Atl. 182.

<sup>86</sup>*In Interstate Power Co. v. Industrial Commission*, (1931) 203 Wis. 466, 234 N. W. 889, cited *supra*, n. 83, the partially dependent parents of the employee who had been killed recovered compensation in Iowa; in this proceeding in Wisconsin an award was made requiring a payment to the Wisconsin state treasurer under a provision of the Wisconsin Act relating to the situation where no person is wholly dependent on the decedent. In discussing the matter of double compensation, the court made no point of the fact that the *state* was recovering.

That a similar situation might arise in other states is suggested by the following cases: *Traveler's Ins. Co. v. Central R. Co. of New Jersey*, (1932) 143 Misc. 589, 258 N. Y. S. 35; *Industrial Commissioner v. Underwood, Elliott Fisher Co.*, (App. Div. 1935) 282 N. Y. S. 229; *Employers' Liability Assur. Corporation v. Eaby*, (1934) 111 Pa. Super. 589, 170 Atl. 352.

<sup>87</sup>*Tidwell v. Chattanooga Boiler & Tank Co.*, (1931) 163 Tenn. 420, 648, 43 S. W. (2d) 221, 45 S. W. (2d) 528, cited *supra*, n. 68.

This election notion finds some support elsewhere. See *Associated Indemnity Corporation v. Landers*, (1932) 159 Okla. 190, 14 P. (2d) 950 (no election because employee had no knowledge that he was receiving

idea of "estoppel"<sup>88</sup> and other ideas<sup>89</sup> have been used to prevent recovery. On the other hand, a Texas court saw no objection to recovery under the Texas Act in spite of collection under the New Mexico Act, emphasizing the fact that neither Act gave full compensation and stating that it was no concern of the defendant insurance company that the employee had received compensation under the New Mexico insurance policy.<sup>90</sup> However, the Texas Act was amended in 1927 to prevent recovery where the employee has "elected" to recover and has recovered in the state of injury.<sup>91</sup> Statutes deal with this matter in some other states.<sup>92</sup>

In passing, it is interesting to notice the insurance problems that sometimes arise when different companies insure against liability under different Acts.<sup>93</sup> For example, in a Connecticut case<sup>94</sup> the employer paid compensation under the Connecticut Act for an injury in Vermont. The employer had taken out policies in Connecticut and Vermont and naturally supposed that he was protected under any contingency. He sued both companies but was denied recovery against either on the ground that the Vermont policy covered only liabilities under the Vermont Act and that

compensation under Kansas Act; he deposited a check for the amount received with the Oklahoma commission).

<sup>88</sup>De Gray v. Miller Bros. Const. Co., (Vt. 1934) 173 Atl. 556.

<sup>89</sup>See Finkley v. Eugene Saenger Tailoring Shop, (Ind. App. 1935) 196 N. E. 536, cited supra, n. 35 (award elsewhere regarded as one factor in denying applicability of Indiana Act); Continental Oil Co. v. Pitts, (1932) 158 Okla. 200, 13 P. (2d) 180 (injury connected with original accident in Texas in which proceedings had been instituted; adjustment by Texas authorities would eliminate question of double recovery).

<sup>90</sup>Texas Employers' Ins. Ass'n v. Price, (Tex. Civ. App. 1927) 300 S. W. 667, writ of error dismissed, no opinion being expressed on question of "election" because no assignment on that point, (1927) 117 Tex. 173, 300 S. W. 672; criticized in (1928) 6 Tex. L. Rev. 404, quoting 1927 amendment. Compare Norwich Union Indemnity Co. v. Wilson, (Tex. Civ. App. 1929) 17 S. W. (2d) 68, (Tex. Civ. App. 1931) 43 S. W. (2d) 473, quoting 1927 amendment.

<sup>91</sup>Texas, Laws 1927, ch. 259, sec. 1; quoted elsewhere as indicated in n. 90, supra.

<sup>92</sup>See Georgia Code, 1933, sec. 114-411; Maryland Laws 1933, ch. 354; North Carolina Code, 1931, sec. 8081 (rr); Virginia Code, 1933, sec. 1887 (37) (b).

<sup>93</sup>Illustrative cases are: Cole v. Industrial Commission, (1933) 353 Ill. 415, 187 N. E. 520, 90 A. L. R. 116, cited supra, n. 71; Norwich Union Indemnity Co. v. Wilson, (Tex. Civ. App. 1929) 17 S. W. (2d) 68, (Tex. Civ. App. 1931) 43 S. W. (2d) 473. Compare Kennedy-Van Saun Mfg. & Eng. Corp. v. Industrial Comm., (1934) 355 Ill. 519, 189 N. E. 916.

<sup>94</sup>Miller Bros. Const. Co. v. Maryland Casualty Co., (1931) 113 Conn. 504, 155 Atl. 709. For a subsequent attempt in Vermont to recover from the insurer under the Vermont policy, see DeGray v. Miller Bros. Const. Co. (Vt. 1934) 173 Atl. 556.

the Connecticut policy did not cover the injury in Vermont! The court expressed regret that the Connecticut act permitted such a situation as to insurance.

V. REMEDIES AGAINST THIRD PERSONS—OTHER MATTERS  
NOT EXPRESSLY COVERED IN THE RESTATEMENT.

Section 401, quoted above,<sup>95</sup> does mention the remedies against third persons but does not enter into the problem as it usually arises in the cases, viz., the effect of "subrogation" or "assignment" provisions in the Acts in favor of an employer or insurer who has paid compensation. The earlier cases were stated in the previous article;<sup>96</sup> some of the recent cases will be stated here. It is difficult if not impossible to formulate many useful generalizations as yet. This much is clear: the interpretation of an assignment provision is governed by the decisions of the state the Act of which is involved.<sup>97</sup>

In a Virginia case<sup>98</sup> the plaintiff brought an action to recover damages for injuries sustained in an accident in Virginia. The defendant set up as a defense the fact that the plaintiff had been awarded compensation under the Pennsylvania Act. The plaintiff was an employee of a resident of Pennsylvania, and the contract of employment was made there. The Pennsylvania Act permitted an employee to receive compensation and also to sue for damages against a third party, but the employer was subrogated to any recovery from the third person to the extent of compensation payments made. Under the Virginia Act, as it was at the time of the injury, acceptance of an award under *that* Act by an employee constituted an election which barred him from proceeding against a third person; the employer could sue but could recover only the amount of compensation paid, and the employee could not participate in the recovery. This provision of the Virginia Act was held to be no bar to the action. The court argued that the employment was within the Pennsylvania Act and out-

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<sup>95</sup>P. 33.

<sup>96</sup>11 MINNESOTA LAW REVIEW 329, 349-352.

<sup>97</sup>Scott v. Missouri Pac. R. Co., (1933) 333 Mo. 374, 62 S. W. (2d) 834; cf. Ierardi v. Farmers Trust Co., (Superior Ct. 1928) 34 Del. 246, 151 Atl. 822; Henriksen v. Crandic Stages, (1933) 216 Iowa 643, 246 N. W. 913.

<sup>98</sup>Solomon v. Call, (1932) 159 Va. 625, 166 S. E. 467. The Court cited Reutenik v. Gibson Packing Company, (1924) 132 Wash. 108, 231 Pac. 773, 37 A. L. R. 830 and Rorvik v. Northern Pac. Lumber Co., (1921) 99 Or. 58, 190 Pac. 331, 195 Pac. 163; both of those cases were discussed in 11 MINNESOTA LAW REVIEW 329, 350-351.

side the Virginia Act and rejected the argument that to uphold the Pennsylvania Act would be to disregard the public policy expressed by the Virginia Act.<sup>99</sup>

A number of the recent cases have involved in various ways the effect of assignment or subrogation provisions in the Act of one state upon an action under the wrongful death statute of another state.

Thus in a case<sup>100</sup> in the circuit court of appeals, fourth circuit, the employee was fatally injured in Virginia, and an action was brought in North Carolina by the employee's administrator against the third person. While the action was pending, the employee's widow was awarded compensation under the Act of North Carolina, the state of the employee's residence and the employer's incorporation. The insurer then filed in the wrongful death action a notice of the award, of its subrogation to the right of action, and of its election to sue in the name of the administrator. The defendant set up the acceptance of the award by the widow as a defense on the ground that the widow was the sole beneficiary under the Virginia wrongful death statute. This was held to be no defense, and a judgment dismissing the action was reversed. The court argued that, in the absence of any provision to the contrary in Virginia, the assignment was governed by the North Carolina Act. The widow, by accepting the compensation impliedly agreed to the assignment which the North Carolina Act directed and was estopped from disputing the rights of the person claiming under the assignment. The assignment was of no concern to the defendant. The court further argued cogently that under the North Carolina and Virginia statutes if the death oc-

<sup>99</sup>A similar willingness to give effect to the assignment provisions of another state's Act is shown by the court in *Kandelin v. Lee Moor Contracting Co.*, (1933) 37 N. M. 479, 24 P. (2d) 731 (injury in New Mexico; injured employee sued third person for damages; court recognized right of employer's insurer to participate in recovery, to extent of compensation payments made under California Act, if established by pleading and proof that California Act provided for partial assignment). But compare *Henriksen v. Crandic Stages*, (1933) 216 Iowa 643, 246 N. W. 913.

On the other hand, a provision of the New York Act giving the insurer who makes payments to the state treasurer under certain circumstances a cause of action against the third party was held not to apply to an injury, which occurred in New Jersey, on the ground that the liability of the tortfeasor must be governed by New Jersey law. *Travelers Ins. Co. v. Central R. Co. of New Jersey*, (1932) 143 Misc. Rep. 589, 258 N. Y. S. 35. Cf. *Employers' Liability Assur. Corporation v. Eaby*, (1934) 111 Pa. Super. 589, 170 Atl. 352, involving the same provision of the New York Act.

<sup>100</sup>*Betts v. Southern Ry. Co.*, (C.C.A. 4th Cir. 1934) 71 F. (2d) 787, discussed in (1934) 83 U. of Pa. L. Rev. 267; (1934) 34 Col. L. Rev. 1549. One judge dissented in a brief opinion.

curred in the state of employment, the insurer could recover from the third party, and the result should not be different where the death occurs in one state and the employment is in the other. The court also took the position that whether the insurer could proceed in this action or must institute a new action was a question of procedure and governed by the law of the forum.

A like view was taken by the New Hampshire court<sup>101</sup> in a situation quite similar except that the action was brought in the state of the fatal injury, New Hampshire. Both cases contain dicta that if the beneficiary under the death statute is a different person from the one entitled to compensation under the compensation Act, the right of the beneficiary could not be affected by compensation paid someone else under the Act of another state.<sup>102</sup>

A similar problem arose in a different way in a New York case.<sup>103</sup> In an accounting proceeding by a widow as administratrix of her husband's estate, it appeared that the husband had been an employee of a New York corporation. He was killed in a railway accident in Michigan. The widow received a compensation award under the New York Act. Later she started an action in Michigan against the railway company and received on a settlement as ancillary administrator in Michigan over \$7,000 which she turned over to herself as administrator in New York. The insurer who paid the compensation award claimed part of that sum under a section of the New York Act which provided for an assignment to the insurer of the cause of action for damages. It was held that the insurer should be paid, on the ground that the section of the New York Act applied to any action brought in New York or any other state, and that the money was within the jurisdiction to be distributed by the widow as administratrix appointed by this court. However, the amount to be paid was only the widow's share, one-third as fixed by the New York statutes, rather than one-half as fixed by the Michigan statutes.

Another situation in which the compensation Acts and wrongful death statutes of different states are involved is presented in a Maryland case.<sup>104</sup> The employment contract was made and the

<sup>101</sup>*Saloshin v. Houle*, (1931) 85 N. H. 126, 155 Atl. 47.

<sup>102</sup>*Cf. Anderson v. Miller Scrap Iron Co.*, (1922) 176 Wis. 521, 532, 181 N. W. 852, 187 N. W. 746, discussed in 11 MINNESOTA LAW REVIEW 329, 351-352.

<sup>103</sup>*In re Hertell's Estate*, (Surr. Ct. 1929) 135 Misc. Rep. 36, 237 N. Y. S. 655, discussed in (1930) 43 Harv. L. Rev. 971.

<sup>104</sup>*London Guarantee & Accident Co. v. Balgowan S. S. Co.*, (1931) 161 Md. 145, 155 Atl. 334.

fatal injury occurred in Texas. Compensation was awarded under the Texas Act and paid by the insurer. The insurer then sued the third person in Maryland, basing the action upon the Texas wrongful death statute and the subrogation provisions of the Texas Act. Recovery was denied because of the Maryland rule<sup>105</sup> that an action under a foreign wrongful death statute cannot be maintained unless there are substantially similar statutes in Maryland. The court compared the wrongful death statutes and the subrogation provisions of the Acts of both states and concluded that they were not sufficiently similar.

A few recent workmen's compensation cases involving miscellaneous conflict of laws points remain to be considered. A time limitation in an Act upon the recovery of compensation has been respected in another jurisdiction.<sup>106</sup> An exemption by the Act of a compensation claim due under the Act from attachment has been held to apply to the claim of a nonresident.<sup>107</sup> In a Georgia case,<sup>108</sup> it was contended that the death of the employees was not compensable under the Georgia Act because the death resulted from their own wilful misconduct in violating the speed laws of South Carolina, but the court followed the finding of the commission that there had been no such violation.

#### CONCLUSION

The above criticism of certain sections of the Restatement is not intended to be captious. It is no fair criticism that the American Law Institute has chosen one of several conflicting rules; that is its privilege and, indeed, one of its functions. It is a fair criticism, however, to insist that sufficient attention was not given, with regard to the problem of when the local Act applies, to cases decided after the publication of the first drafts. There is not enough difference, on this problem, between the tentative draft<sup>109</sup> published in April, 1928, and the final publication in 1934. After all, workmen's compensation is of relatively

<sup>105</sup>That rule is not followed in most jurisdictions. 2 Beale, *The Conflict of Laws*, (1935) sec. 392.2, citing this Maryland case on p. 1309, n. 2; Rose, *Foreign Enforcement of Actions for Wrongful Death*, (1935) 33 Mich. L. Rev. 545, citing this Maryland case on p. 561, n. 64. The Restatement rejects the Maryland rule. Restatement, *Conflict of Laws*, sec. 392, comment a.

<sup>106</sup>*Ford, Bacon & Davis v. Volentine*, (C.C.A. 5th Cir. 1933) 64 F. (2d) 800, cited *supra*, n. 10 and 70. See 3 Beale, *The Conflict of Laws*, sec. 605.1, citing instant case at p. 1627, n. 7; Restatement, *Conflict of Laws*, sec. 605.

<sup>107</sup>*Festervand v. Laster*, (1930) 15 La. App. 159, 130 So. 634.

<sup>108</sup>*Metropolitatn Casualty Ins. Co. v. Huhn*, (1928) 165 Ga. 667, 142 S. E. 121.

recent origin; the first American case involving a claim for compensation for an injury occurring outside the state was decided in Massachusetts in 1913.<sup>110</sup> This lag<sup>111</sup> may be due, in part, to the rather cumbersome machinery of the Institute.

The criticism of the Restatement's treatment of the *Clapper Case* does not imply, of course, that account should have been taken of cases decided after the publication of the Restatement. Those cases merely demonstrate that the Restatements are not a bar to progress. No true friend of the Institute desires that they should be. On the other hand, the Restatement's conception of the *Clapper Case* itself is open to fair comment, including attention to the influence of the case in other cases before the publication of the Restatement.

For the future, the Restatement, no doubt, will exercise some influence, as it has done already,<sup>112</sup> particularly as to the less controversial matters. As to other matters, however, it is not likely that different positions taken in many states will be abandoned or that their influence in other states will cease. The tendency to enact express provisions in the Acts may continue. These provisions have the merit of introducing a degree of certainty with the corresponding disadvantage of limiting the flexibility which may be desirable in the unusual case. General uniformity seems a long way off, although considerable copying, especially in the same section of the country,<sup>113</sup> will take place as in the past. It is significant that the Commissioners on Uniform State Laws in 1928 withdrew as obsolete the Uniform Workmen's Compensation Act.<sup>114</sup> Complete abdication seems unnecessary. The commissioners might well consider the preparation of short statutes dealing with particular problems, e. g., the effect of a previous award in another state.<sup>115</sup> Finally, the existing and possible future cases in the United States Supreme Court will limit local vagaries, but probably will leave considerable room for the play of local policy.

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<sup>109</sup>Conflict of Laws, Restatement No. 4 (1928), Topic V, citing the author's previous article in 11 MINNESOTA LAW REVIEW 329.

<sup>110</sup>Gould's Case, (1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D 372, 4 N. C. C. A. 60, cited supra, n. 17.

<sup>111</sup>Compare a similar lag in the Torts Restatement, discussed in Feezer, Tort Liability of Manufacturers, (1935) 19 MINNESOTA LAW REVIEW 752, 761-762.

<sup>112</sup>See supra, n. 55 and 79.

<sup>113</sup>See supra, n. 92.

<sup>114</sup>(1928) Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, p. 30-31.

<sup>115</sup>Other methods of reform are suggested in 11 MINNESOTA LAW REVIEW 329, 352-353.